

SUPREME COURT OF INDIA

Ramesh Chandra Shah

Vs.

Anil Joshi

C.A.Nos.2802-2804 of 2013

(G.S.Singhvi and Kurian Joseph JJ.)

03.04.2013

JUDGMENT

G.S. SINGHVI, J.

1. Leave granted.

2. In response to an advertisement issued by the Uttarakhand Board of Technical Education (for short, 'the Board'), which was published in the newspaper "Amar Ujala" dated 5.5.2011, the appellants and the private respondents submitted applications for the posts of Physiotherapist. All of them appeared in the written test held on 25.9.2011. The appellants were declared successful and they became entitled to be appointed against the advertised posts.

3. The private respondents, who failed to clear the test filed Civil Misc. Writ Petition No.1625/2011 for quashing the advertisement and the process of selection. They pleaded that the advertisement and the test conducted by the Board were ultra vires the provisions of the Uttar Pradesh Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998 (hereinafter described as 'the Special Rules').

4. In the counter affidavit filed by the official respondents, it was averred that the selection was made in accordance with the Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 (hereinafter described as, 'the General Rules'). It was further averred that the writ petitioners (the private respondents herein) do

not have the locus to question the advertisement and the selection process because they had submitted applications and participated in the test knowing fully well that the selection was being made in accordance with the General Rules.

5. The learned Single Judge overruled the objection taken by the official respondents by observing that the process of recruitment was vitiated due to patent illegality and, in such a case, the principle of waiver cannot be invoked for non-suiting the writ petitioners. On merits, the learned Single Judge opined that even though Rule 2 of the General Rules contains a non obstante clause, the Special Rules regulating the recruitment of Physiotherapists will prevail and the Board was not entitled to conduct the test and declare the result by relying upon the General Rules. He, accordingly, allowed the writ petition and quashed the selection with a direction that the available posts be advertised afresh.

6. On an appeal filed by some of the successful candidates, the Division Bench of the High Court held that after having taken a chance for selection, the private respondents were not entitled to question the process of selection. Notwithstanding this conclusion, the Division Bench observed that the private respondents were entitled to insist for a direction to complete the selection process by adding 30% marks for intermediate examination and 70% marks for diploma/degree examination to the marks obtained by each examinee, who appeared in the test conducted by the Board and also to declare that those who have not obtained 30% marks in diploma/degree examination are unfit. The operative portion of the judgment of the Division Bench reads as under:

“We, accordingly, allow the appeal and modify the judgment and order under appeal by upholding the quashing of concerned merit list of Physiotherapists prepared by the Board, but at the same time, direct the Board to reject all those examinees, who appeared in the examination for being appointed as Physiotherapists, but not received 30% marks in diploma examination and to complete the selection of Physiotherapists by adding to the marks obtained by the fit examinees in the written examination, 30% marks for intermediate examination and 70% marks for diploma / degree examination. Let the said exercise be completed as quickly as possible, but not later than two months from the date of service of a copy of this order upon the Board.”

7. The review applications filed by the selected candidates were dismissed by the Division Bench but the time fixed for compliance of the direction contained in judgment dated 2.5.2012 was extended.

8. Learned counsel for the parties reiterated the arguments made by their counterparts before the High Court. Shri Pallav Shishodia, learned senior counsel appearing for the appellants argued that after having accepted the appellants' contention on the issue of locus of the private respondents to challenge the process of selection, the Division Bench of the High Court was not at all justified in directing the Board to prepare fresh select list by adding marks for intermediate and degree/diploma qualifications. He further argued that the learned Single Judge and the Division Bench committed grave error by refusing to non suit the private respondents despite the fact that from the stage of submission of applications they knew that the selection was being held in accordance with the General Rules. Learned senior counsel referred to Office Memorandum No.1083/XXXX(2)/2010 dated 3.8.2010 issued by the Personnel Department of the State and the opening paragraph of the advertisement to drive home the point that the selection was to be made in accordance with the procedure prescribed under the General Rules and every candidate was aware of this.

9. Ms. Rachana Srivastava, Standing Counsel for the State of Uttarakhand adopted the arguments of Shri Shishodia and submitted that the Division Bench of the High Court was not at all justified in making out an altogether new case for which there were no pleadings.

10. Learned counsel for the private respondents supported the order passed by the learned Single Judge and argued that the Division Bench of the High Court did not commit any error by directing the Board to prepare fresh select list by adding marks for the academic qualifications to the marks secured in the written test.

11. We have considered the respective arguments and scrutinized the records.

12. The State of Uttarakhand (earlier known as 'Uttaranchal') was formed w.e.f. 9.11.2000. Before formation of the new State, recruitment to the posts of Physiotherapist and Occupational Therapist was governed by the Special Rules and recruitment to other group "C" posts was governed by the provisions contained in the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Posts (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998, which were published in Official Gazette dated 9.6.1998. After formation of the new

State, the rules governing the recruitment and other conditions of service applicable to the erstwhile State of Uttar Pradesh were adopted by the Government of the new State by Adaptation and Modification Order 2002. In 2008, the Governor of Uttarakhand in exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution amended the Special Rules. The academic and preferential qualifications for the post of Physiotherapist, as contained in the Special Rules were:

“8. Academic Qualifications - A candidate for direct recruitment to the various categories of posts in the service must possess the following qualifications-

(1) Physiotherapist - (i) must have passed the Intermediate Examination with Science of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto.

(ii) Must possess a degree or diploma in physiotherapy from an Institution, recognized by the Government.

(2) Occupational Therapist - (i) must have passed the Intermediate Examination with Science of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto.

(ii) Must possess a degree or diploma in Occupational Therapy from an Institution recognized by the Government.

9. Preferential Qualification - A candidate who has-

i) Served in the Territorial Army for a minimum period of two years, or

(ii) Obtained ‘B’ Certificate of National Cadet Corps, shall, other things being equal be given preference in the matter of direct recruitment.”

By Rule 15 of the Special Rules, which is reproduced below, it was laid down that direct recruitment to the various categories of posts shall be made in accordance with the General Rules:

“15. Procedure for direct recruitment - Direct recruitment to the various categories of posts in the service shall be made in accordance with the Uttar Pradesh Procedure for Direct Recruitment for Group ‘C’ Posts (outside the purview of the Uttar Pradesh Public Service Commission) Rule, 1998, as amended from time to time.”

13. By Notification dated 4.8.2008, the Special Rules were amended and the existing Rule 15 was substituted by the following:

“15(1) For direct recruitment the appointing Authority shall noting the format of application form and vacancies together in the following manner:

(i) By issuing advertisement in daily newspaper, having wide circulation.

(ii) By pasting the notice on the notice-board of the office or by advertising through Radio/Television and other employment newspaper.

(iii) By notifying vacancies to the Employment Exchange.

(2) For the purpose of direct recruitment there shall be constituted a selection committee comprising the following-

(i) Appointing Authority Chairman (ii) If the Appointing Authority does not belong to the Scheduled Member castes or scheduled tribes, an officer belonging to the Scheduled castes or Scheduled Tribes, not below the rank of joint Director, shall be nominated by the Director General. If the Appointing Authority belongs to the Scheduled Castes or Scheduled Tribes, in that case an officer belonging to other than Scheduled Castes or Scheduled Tribes, shall be nominated by the Director General (iii) An officer belonging to the Member minority community, not below the rank of joint Director to be nominated by the Director General (iv) An officer belonging to Backward Member Classes, not below the rank of Joint Director, to be nominated by the Director General (3) The Selection Committee shall, having regard to the need of securing due representation of the candidates, belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with rule 6, scrutinize the applications. (4) For Selection, there shall be an objective type written examination of 100 marks consisting of single questions paper

which will include General Hindi, General Knowledge and concerned subject. While evaluating the questions paper, one marks shall be awarded, for each correct answer and 1A mark shall be deducted for each incorrect answer be deducted for each incorrect answer as negative marking (ii) After the examination is over, the candidates shall be allowed to carry back the Question Booklet of the Written examination with them (iii) After the written examination, shall be displayed on the Uttarakhand website www.ua.nic.in or published in the daily newspaper, having wide circulation. (iv) The Answer Sheet of the written examination shall be in duplicate (including the carbon copy and the candidates shall be permitted to carry back the duplicate copy with them. (v) The candidates will be awarded 30 percent and 70 percent marks for the percentage of marks obtained in the intermediate examination and Diploma/Degree examination, respectively. (vi) Candidates obtaining less than 40 percent marks in the written test and less than 30 percent marks in Diploma examination shall be unfit for selection. (vii) The merit list shall be prepared by the Selection committee on the basis of the aggregate of marks obtained in the test for selection carrying 200 marks, which will include 100 marks for written examination, 30 percent marks of Intermediate examination and 70 per cent marks of Diploma/Degree examination. (5) Thereafter the Selection Committee shall prepare a list in order of proficiency as disclosed by the aggregate of marks obtained by each candidate and recommend such number of candidates, it considers suitable for appointment. It more candidates obtain equal marks in the aggregate, the name of the candidate obtaining more marks in the written examination shall be placed higher in the list if two or more candidates obtain equal marks in the written test also, the candidate senior in age shall be placed higher in the section list. The number of names in the list shall be more (but not more than 25 percent) than the number of vacancies, the selection Committee shall forward the list to the Appointing Authority.”

14. Rule 2 of the General Rules, which is *pari materia* to rule framed by the Governor of Uttar Pradesh in 1998 and which contains a non obstante clause, reads as under:

“Overriding |2. |These rules shall have | |effect | |effect notwithstanding | | |
|anything to the contrary | | | |contained in any other | | | |Rules or orders.” |

15. At this stage, it will also be useful to notice the contents of Office Memorandum dated 3.8.2010 and the opening paragraph of the advertisement issued by the Board which, as mentioned above, was published in the newspaper dated 5.5.2011:

Office Memorandum

“STATE OF UTTARAKHAND

PERSONNEL DEPARTMENT-2

NO.1083/XXXX(2)/ 2010 DATED 03rd AUGUST, 2010

OFFICE MEMORANDUM

As per Provisions prescribed, for selection /recruitment on parties of Group 'C' falling outside the purview of Public Service Commission, selection has to be made by concerned Appointing Authority.

As separate recruitment/selections, on vacant posts by every Appointing Authority would require more time labour.

Hence, after proper consideration Hon'ble Governor Uttarakhand, in respect of vacant posts of falling outside the purview of Public Service Commission has nominated Uttarakhand Technical Education Board, as recruiting agency further prescribes the following:

1. In this respect, State will provide to Uttarakhand Technical Education required resources.
2. Every Appointing Authority, will calculated the vacant posts falling outside the purview of Uttarakhand Public Service Commission, and will sent requisition in prescribe proforma in which detail of number of posts reserve for vertical as well as horizontal reservation should be clearly mentioned and should provided the same Uttarakhand Technical Education Board.

3. Technical Education Board on receiving such requisition from Appointing Authority should advertise for recruitment under prescribe Rules, within one month.

4. Technical Education Board, after publication of advertisement, shall start the selection proceedings, as per provisions of Uttarakhand Procedure for Direct Recruitment for Group 'C' Posts (outside the purview of Uttarakhand Public Service Commission) Rule 2008 shall complete selection proceedings as soon as possible forward its recommendation to the Appointing Authority. (Dileep Kr. Kotia)

Principal Secretary”

Advertisement

“UTTARAKHAND TECHNICAL EDUCATION BOARD ROORKEE
(HARIDWAR)- 247667

ADVERTISEMENT NO STATE GROUP ‘C’ COMBINED

RECRUITMENT EXAMINATION 2011

DATED 4 MAY 2011

DATE OF ADVERTISEMENT- MAY 04, 2011

LAST DATE OF ACCEPTANCE OF APPLICATION FORMS- JUNE 04,
2011

FOR DETAILED ADVERTISEMENT PLEASE VISIT BOARD'S
WEBSITE AT

Vide Office Memo No-1063/XXX(2) 2010 dated 03.08.2010 of Personnel Department-2, Uttarakhand State, Uttarakhand Technical Education Board, Roorkee has been chosen as recruiting agency for vacant posts in various departments of government which are outside the purview of Public Service Commission Group ‘c’ Combined Recruitment Examination- 2011.”

16. The method of selection enumerated in para 11 of the advertisement, which was a clear departure from the Special Rules, reads thus:

“11. SELECTION EXAMINATION AND SYLLABUS OF QUESTION PAPER:- For selection, there shall be an

Objective type written examination Of 100 marks consisting of single Question paper out of which questions of 50 marks will include general Hindi, general , general awareness and knowledge of geography, culture, economy and history of State of Uttarakhand and questions of 50 Marks will be based on the subjects Of minimum required qualification for the concerned post. Written examination will be of two hours. While evaluating the question paper, one mark shall be awarded for each correct answer marks shall be deducted for each incorrect answer as negative marking.

Retrenched employees will be awarded 5 marks for each year of completed Service upto the maximum of 15 marks.

After the written examination is over, the candidate shall be allowed to carry with them the question booklet along with the carbon copy of the answer sheet.

After the written examination, the answer key of the written examination will be displayed on the Board's website uk.gov.in and www.ubter.in

In the marks obtained in written Examination will be added other evaluations which Includes weightage points for 'retrenched employees' and for post having technical subject Of (village development officer) for which competitive exam of prescribed marks is held and marks obtained in such exams, after adding such marks or weightage as the case may be in the marks obtained in written test merit list will be prepared (final select list).

Such list shall contain names more than the vacancies (but not more than 25%)

Final select list will be displayed on the Board's web site uk.gov.in and www.ubter.in If two candidates obtain equal marks than one who has obtained higher marks in the written test shall be placed higher in the merit

list, but if marks are equal in the written test also then one who is elder in age shall be placed higher in the merit list.”

17. Those who were desirous of competing for the post of Physiotherapist, which is a Group ‘C’ post in the State of Uttarakhand must have, after reading the advertisement, become aware of the fact that by virtue of Office Memorandum dated 3.8.2010, the Board has been designated as the recruiting agency and the selection will be made in accordance with the provisions of the General Rules. They appeared in the written test knowing that they will have to pass the examination enumerated in para 11 of the advertisement. If they had cleared the test, the private respondents would not have raised any objection to the selection procedure or the methodology adopted by the Board. They made a grievance only after they found that their names do not figure in the list of successful candidates. In other words, they took a chance to be selected in the test conducted by the Board on the basis of the advertisement issued in November 2011. This conduct of the private respondents clearly disentitles them from seeking relief under Article 226 of the Constitution. To put it differently, by having appeared in the written test and taken a chance to be declared successful, the private respondents will be deemed to have waived their right to challenge the advertisement and the procedure of selection.

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

19. One of the earliest judgments on the subject is *Manak Lal v. Dr. Prem Chand* AIR 1957 SC 425. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct leveled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below:

“.....If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other

member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time.

From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time.....

.....Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

20. In *Dr. G. Sarna v. University of Lucknow* (1976) 3 SCC 585, this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. In *Om Prakash Shukla v. Akhilesh Kumar Shukla* (1986) Supp. SCC 285, a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in *Madan Lal v. State of J K* (1995) 3 SCC 486 in the following words:

“The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla* it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

22. In *Manish Kumar Shahi v. State of Bihar* (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

“We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

23. The doctrine of waiver was also invoked in *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others* (2011) 1 SCC 150 and it was held:

“When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be

essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.”

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.

25. We are also prima facie of the view that the learned Single Judge committed an error by holding that despite the non obstante clause contained in Rule 2 of the General Rules, the Special Rules would govern recruitment to the post of Physiotherapist. However, we do not consider it necessary to express any conclusive opinion on this issue and leave the question to be decided in an appropriate case.

26. In the result, the appeals are allowed, the impugned orders as also the one passed by the learned Single Judge are set aside and the writ petition filed by the private respondents is dismissed. Parties are left to bear their own costs.